Filed 10/8/04 Hanna v. South Coast Air Quality Management Dist. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

REFAAT K. M. HANNA, Plaintiff and Appellant, v. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT et al., Defendants and Respondents.	B163831 (Los Angeles County Super. Ct. No. KC 036404)

APPEAL from a judgment of the Superior Court of Los Angeles County. Conrad R. Aragon, Judge. Affirmed.

Joe B. Cordileone & Associates, Joe B. Cordileone and Silvia V. Townsend for Plaintiff and Appellant.

Bragg & Kuluva and Marla Ness for Defendants and Respondents South Coast Air Quality Management District, Sandra L. Ryan and Kenneth R. Fisher.

Plaintiff Refaat K. M. Hanna sued his employer (South Coast Air Quality Management District (AQMD)) and two superiors (Sandra Ryan and Kenneth Fisher), claiming he was transferred in retaliation for making a complaint and was discriminated against due to his national origin and age. The trial court granted defendants' motion for summary judgment, finding no triable issues of material fact. We affirm.

BACKGROUND

Plaintiff, who is 58, has worked for AQMD since 1985. His current job title is Air Quality Instruments Specialist II. He is "an Arab-American male and United States citizen of Egyptian national origin and of the Coptic Orthodox Christian faith."

A. Plaintiff's Allegations

The operative pleading, the second amended complaint, contains several claims such as religious discrimination and conversion of property that will not be addressed in this opinion because they are no longer at issue.

1. Retaliatory Transfer Claim

Plaintiff contends he was transferred in retaliation for engaging "in the protected activity of reporting claims of illegal harassment to his government employer." Plaintiff claims: (1) he was harassed by defendants Ryan and Fisher; (2) he reported the harassment to AQMD branch manager John Higuchi; (3) Higuchi then transferred plaintiff from Riverside (which was only a 5-7 minute commute from plaintiff's home) to AQMD headquarters in Diamond Bar, which is a "burdensome commute of over two hours each day[]"; (4) his level one and two grievances concerning the transfer were unsuccessful; and (5) his level three and four hearings were denied without a hearing. Plaintiff contends the transfer was an adverse employment action because it increased his commute time and was in retaliation for having engaged in protected activity.

Plaintiff alleges that in 1998, Ryan and Fisher began a campaign to harass plaintiff. Plaintiff contends that in November 1998, Ryan, who was then his immediate supervisor, tried to persuade plaintiff to transfer out of Ryan's unit. When plaintiff

refused, Ryan allegedly "flew into a rage and reminded him that she could be 'nasty and rude' if he chose to stay under her supervision. . . . Defendant RYAN and Defendant FISHER frequently spoke to [plaintiff] in a degrading and harsh manner[and] made it their daily custom and habit to harass him."

The incident which plaintiff reported to Higuchi occurred in March 2000, when Fisher was collecting Ontario Airport photo identification badges and gate keys from AQMD employees, including plaintiff. Plaintiff refused to give his badge and key to Fisher, but offered to accompany Fisher to deliver them personally "to ensure that [they] did not fall into the wrong hands." Plaintiff's remark allegedly enraged Fisher, who allegedly "began slamming his fist on [plaintiff's] desk and shouting profanities at [plaintiff]. It was a frightening event for [plaintiff] who feared for his life and was left badly shaken thereafter."

Plaintiff claims that when he told Ryan about the above incident, Ryan "gave [plaintiff] permission to document the incident in the station's log book. . . . However, on or about April 14, 2002, Defendant RYAN contacted [plaintiff] to recant her instruction and actually cut the page out of the logbook. . . . To add further insult, Defendant RYAN ordered [plaintiff] to apologize to Defendant FISHER or else suffer disciplinary action in the form of a 'needs improvement' on his next review. [Plaintiff] could not believe he was being threatened after he was the victim of Defendant FISHER's profanity and violence. [Plaintiff's] badge and gate key were not returned to him while other employees had their badges and gate keys returned to them . . . ."

In May 2000, plaintiff documented the airport badge and gate key incident in a memo to branch manager Higuchi. Five days later, "Higuchi informed [plaintiff] that he would be involuntarily transferred from his current location at the Riverside Air Monitoring station to the Support Section of the SCAQMD Diamond Bar District headquarters."

2. Discrimination Claim

Plaintiff claims that Ryan expressed her "discriminatory animus" for him even before becoming his supervisor in 1998. According to plaintiff, at some time between 1993 and 1996, Ryan stated that she would not "choose [plaintiff] for promotional opportunities, even if he were the 'last person on earth.'"

Plaintiff contends that Ryan's dislike of plaintiff stems from the fact that plaintiff "happens to be of Egyptian national origin and speaks English with a noticeable foreign accent. Although this fact did not affect [plaintiff's] ability to perform his job duties, [the evidence supports] an inference [that Ryan harbors] disdain . . . toward non-native speakers of the English language."

Plaintiff also alleges that Ryan (who is almost 60) has contempt for older workers such as plaintiff. Ryan allegedly "affirmed her contempt for older workers such as [plaintiff] when she stated to [plaintiff]: '*You are being silly Refaat as you become old*.' . . . [Plaintiff] is currently 58 years old and was 55 years old at the time this statement was made. Defendant RYAN has made similar statements regarding 'older' workers, such as Mr. Bob Shaw, whom Defendant RYAN also characterized as 'old and silly.' . . ."

B. Summary Judgment Motion

In moving for summary judgment, defendants contended that plaintiff was transferred to Diamond Bar for the following legitimate, non-discriminatory reasons: A vacancy was created at Diamond Bar by the retirement of "an Instrument Specialist II in the Repair & Calibration Section, Ernie Taroc[.]" After AQMD posted the vacancy for two weeks and received no applications, AQMD elected to fill it by means of involuntary transfer, as permitted by both AQMD policy and the Teamsters Memorandum of Understanding.

1. Legitimate Business Reasons for Transfer

Defendants presented evidence that the Diamond Bar transfer saved plaintiff from a potential job reclassification and pay reduction at Riverside. The evidence showed that at Riverside, plaintiff's position was actually classified as Instrument Specialist I, even though plaintiff was receiving the higher salary of Instrument Specialist II. This disparity between plaintiff's position and salary placed plaintiff at risk of being reclassified to the lower level and lower salary if he remained at Riverside. This disparity also created a morale problem for other technicians at Riverside who were performing the same job as plaintiff but for lower pay.

Defendants explained that two technicians, plaintiff and Joe Velasco, were in the unique position of working as Instrument Specialist I's while receiving the higher salary of Instrument Specialist II's, and that this was creating a morale problem. AQMD decided to choose either plaintiff or Velasco for the involuntary transfer to Diamond Bar for the Instrument Specialist II position. As required by the Teamsters MOU regarding involuntary transfers, AQMD selected plaintiff because he has less seniority than Velasco. While other Instrument Specialist II's have less seniority than plaintiff, they were not considered because they were already working as Instrument Specialist II's.

In addition to the legitimate business reason for the transfer, defendants contended the transfer was not an adverse job action because plaintiff retained the same level of compensation, seniority, and benefits that he had at Riverside, but without the risk of a job reclassification and pay cut. While plaintiff's commute was lengthened, the majority of AQMD employees work in Diamond Bar and many have similarly long commutes, including Fisher and Ryan. Moreover, plaintiff commutes to Diamond Bar in a van provided by AQMD, which pays for gas, servicing and repair.[1]

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[1] In support of their contention that the lengthening of plaintiff's commute was not an adverse employment action, defendants stated: "The Tenth Circuit Appellate Court has held that mere increase in commute time and distance due to a job transfer is not actionable as an adverse employment action.

Plaintiff, in opposition to the summary judgment motion, failed to dispute the above-stated facts, except to note that the Teamsters MOU fails to mention employee morale as a factor in making involuntary transfer decisions.

2. Airport Badge & Key Incident

Defendants contended that Fisher's collection of plaintiff's airport badge and key was not an adverse employment action because plaintiff lost no benefits or privileges as a result of that action. It was undisputed that in 1999-2000, AQMD began phasing out its operation at the airport. When Fisher collected the airport security badges and keys, neither plaintiff nor any other technician was performing calibration work at the airport.

3. Personality Clashes Only

Defendants contended that the "facts indicate the likelihood of personality conflicts and work-related disputes, but not bigotry."

Defendants asserted, and plaintiff did not dispute, that even if plaintiff and Ryan had conflicts, the evidence shows that plaintiff *does not know why* Ryan dislikes him or why Ryan did not choose him for transfers and promotions.[2] Similarly, defendants asserted, without contradiction from plaintiff, that plaintiff believes Ryan hated him *for no reason* and was using Fisher to force him out of Ryan's section. Defendants contended that "[e]ven if it's true that Fisher behaved inappropriately toward [plaintiff] – even if it's true that Ryan manipulated Fisher behind the scenes – those acts

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Sanchez v Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998) (holding that an increase in commute from 5-10 minutes to 30-40 minutes was not an adverse employment action). An employment action is considered adverse if it 'constitutes significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' [I]bid. Likewise, in Grande v. State Farm Mutual Automobile Insurance Co., 83 F.Supp.2d 559, 563 (E.D. Pa. 2000), the court held that, absent evidence of actual harm to plaintiff's career or some indication that he could not perform the job, a lengthened commute does not constitute adverse job action for the purpose of proving discrimination. Plaintiff's circumstances are no different from the plaintiffs in Sanchez and Grande."

2 Defendants presented evidence, which plaintiff failed to rebut, that Ryan processed only one of plaintiff's job applications in the early 1990's, and that job was awarded to a higher scoring applicant.

In his reply brief, plaintiff discusses his failure to receive promotions. As this issue was not raised in the opening brief, we will not consider it.

manifested personality clashes, not discrimination. Defendants pointed out, for example, that although plaintiff accused Fisher of "'corrupt[ing]' his computer," plaintiff admittedly does not know whether this was motivated by plaintiff's "race, religion or age." In addition, although plaintiff complained about problems at work with computer malfunctions, broken air conditioners, cigarette smoke, poor ventilation, and rotting carpet, plaintiff admittedly was not the only employee to complain about those problems.

4. No Disparate Treatment

Defendants contended that plaintiff has no evidence, either direct or indirect, of disparate treatment. Defendants asserted, and plaintiff did not dispute, that Fisher never denigrated plaintiff's race, ethnicity, age, or religion. Defendants also contended that with only one exception, plaintiff presented no direct evidence of comments by Ryan on plaintiff's race, ethnicity, or age. The sole exception "concerns Ryan's singular, cajoling remark in 2000 to the effect that Plaintiff may be getting 'silly in his old age' or 'silly as he is getting old.' The remark surfaced when Ryan learned that Plaintiff hurriedly left the Crestline air monitoring station to avoid Fisher and failed to sign in the station logbook [record citation omitted]. Ryan, who soon turns 60, has been known to make off-the-cuff, age-related comments about other employees at AQMD [record citation omitted]. Her comment to Plaintiff was isolated, trivial, did not alter the conditions of Plaintiff's employment and does not, therefore, constitute evidence of discrimination. See, Rubinstein v. Administrators of Tulane Educational Fund (5th Cir. 2000) 218 F.3d 392, 400; Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, 130-131 . . . ."

In opposition, plaintiff presented evidence that "Sandra Ryan told Michael Agnew that when he retired he should take Bob Shaw with him because he's old and silly and doesn't do his job very well."

5. Plaintiff's Motion to Reopen Discovery

In opposition to the summary judgment motion, plaintiff submitted two emails (one from Cynthia Shen and another from Michael Agnew) that were acquired after the discovery cutoff date. In his separate statement, plaintiff cited the emails as evidence of Ryan's racial or ethnic bias against him.[3]

In reply to plaintiff's separate statement, defendants objected to the email evidence. The trial court *overruled* the objection.

The trial court also denied plaintiff's request for a continuance to allow additional discovery "for the limited purpose of deposing Mr. Agnew so as to authenticate his email and the statement of Ms. Ryan contained therein. Such authentication would permit the introduction of Ms. Ryan's statement into evidence as permissible hearsay under California Evidence Code section 1220."[4]

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[3] One email was "from a UCLA researcher Cynthia Shen," dated July 25, 2002, and was sent to Michael Agnew and Ryan. Agnew forwarded Shen's email to plaintiff and related Ryan's reaction to Shen's email, which was: "'That if ***these people*** are going to be here they should learn English.'" Plaintiff contended that Ryan's comment reflects animus toward immigrants, such as plaintiff, who speak English with a non-native accent. Plaintiff argued, "Given this outburst, it is not possible for this Court to conclude as a matter of law that Ms. Ryan's attitude toward [plaintiff's] ethnicity played no role in her treatment toward [plaintiff]."

[4] On appeal, plaintiff contends the trial erred in denying his request for a continuance to reopen discovery. When the trial court overruled defendants' objection to the disputed evidence, however, the request to reopen discovery became moot because the emails were not excluded.

Plaintiff contends the denial of a continuance was prejudicial because defendants "prevent[ed]" him from exercising his right (pursuant to court order) to conduct an in camera review of Ryan's personnel file. If plaintiff actually moved for a continuance specifically in order to review Ryan's personnel file, we could not find such a motion in the record nor has plaintiff provided us with the record citation to such a motion.

We know of only one request for continuance, which was contained in a footnote to plaintiff's opposition to the summary judgment motion. In that footnote, plaintiff requested a continuance "for the limited purpose of deposing Mr. Agnew so as to authenticate his email and the statement of Ms. Ryan contained therein. Such authentication would permit the introduction of Ms. Ryan's statement into evidence as permissible hearsay under California Evidence Code Section 1220."

Ryan's statement, "'that if these people are going to be here they should learn English[,]'" was set forth in plaintiff's separate statement as Fact No. 109. In its order granting defendants' motion for summary judgment, the trial court specifically *overruled* defendants' objection to Fact No. 109. Accordingly, the record reflects that Fact No. 109 was accepted as true, thereby eliminating the necessity of granting plaintiff's request for a continuance.

C. Summary Judgment Ruling

In granting summary judgment, the trial court stated in part: "As to the 1st and 2nd causes of action, no prima facie case of discrimination resulting in the job transfer is shown; the evidence establishes Defendants acted out of non-discriminatory motives and Plaintiff fails to show Defendants' explanation for transfer was mere pretext. While Plaintiff shows that Defendant Ryan harbored animus toward Plaintiff, there is no evidence indicating that such animus caused or resulted in any employment action adverse to Plaintiff. Moreover, the Court finds that Plaintiff's involuntary transfer was not an adverse employment action as a matter of law. As to the 3rd cause of action, the Court finds, as a matter of law, that the allegedly harassing comments and other conduct attributed to Defendants Ryan and Fisher are neither sufficiently severe nor pervasive enough to constitute harassment; and the failure to respond to Plaintiff's complaints concerning his work environment – e.g., problems with the air conditioner; retrieval of Plaintiff's airport badge – is not shown to have been motivated by impermissible bias. As to the 4th cause of action, since the Court finds no harassment, there is no failure on the part of Defendant SCAQMD to prevent harassment; and, in any event, the evidence indicates that SCAQMD made a good faith investigation of Plaintiff's complaints. As to the 5th cause of action, it is not disputed that Defendant SCAQMD did not convert any property of the Plaintiff. Plaintiff's request to reopen discovery . . . is denied."

It appears, therefore, that plaintiff is raising a *new* issue on appeal, namely that a continuance should have been granted to permit him to review Ryan's personnel file. Plaintiff's failure to state this particular reason as a basis for seeking a continuance below constituted a failure to comply with Code of Civil Procedure section 437c, subdivision (h). That statute requires that the "'non-moving party seeking a continuance "must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623 [16 Cal.Rptr.2d 496].)' (*Frazee v. Seely* [2002] 95 Cal.App.4th [627,] 633 . . . .) The decision whether to grant such a continuance lies within the discretion of the trial court. (*Ibid.*)" (*California Auto. Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292, 1305.) On this record, it is impossible to find that the failure to grant a continuance constituted an abuse of discretion.

DISCUSSION

I

Summary judgment is appropriate only where no material issue of fact exists or where the record establishes as a matter of law that a cause of action asserted against a party cannot prevail. After examining the facts before the trial judge on a summary judgment motion, an appellate court independently determines their effect as a matter of law. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1664.)

According to section 437c, subdivision (p)(2) of the Code of Civil Procedure, "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

II

The trial court granted summary judgment on the first and second causes of action for discrimination after finding, as a matter of law, that the transfer was *not* an adverse employment decision. The evidence was undisputed below that AQMD decided to choose either plaintiff or Velasco for the transfer because they were the only technicians working as Instrument Specialist I's for the higher salary of Instrument Specialist II's, and this was creating a problem with morale. The transfer would eliminate any risk of a job reclassification and pay cut. Of the two, plaintiff had less seniority, which, according to the union MOU, was the deciding factor.

Plaintiff contends triable issues of material fact exist as to whether the stated reasons for his transfer were merely pretextual. Plaintiff states in part: "The elements of retaliation are: the plaintiff engaged in a protected activity, such as exercising his right to report the illegal conduct of a government employer; the employer subjected him to adverse employment action; and there is a causal link between the employee's activity and the employer's action. *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476. On summary judgment, the initial burden is on the moving party to negate an element of plaintiff's prima facie case or to demonstrate a complete defense. [Code Civ. Proc., § 473c, subd. ([p])(2).] Under the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 800-806, once the defendant has [proffered] a seemingly legitimate reason for its action, the plaintiff has the burden to show that the stated reason was merely a pretext, and that discrimination was the real reason behind the adverse employment decision."

Plaintiff's position, as we understand it, is that because the transfer conveniently separated him from his alleged harassers (Ryan and Fisher), including the supervisor who harbored illegal prejudices against him, a jury must decide whether the stated reasons for his transfer were a mere pretext for discrimination. Plaintiff contends the transfer *was* an adverse employment action because it was a *punishment* for having exercised his protected right of reporting the airport badge and key incident.

Plaintiff contends that notwithstanding AQMD's stated reasons for his transfer, the transfer was more likely motivated by a discriminatory reason because it came immediately after he complained to Higuchi about the airport badge and key incident. """To establish a prima facie case of retaliation, a plaintiff must show that [he] engaged in protected activity, that [he] was thereafter subjected to adverse employment action by [his] employer, and there was a causal link between the two."' [Citations.] 'The retaliatory motive is "proved by showing that plaintiff engaged in protected activities, and that the adverse action followed within a relatively short time thereafter." [Citation.] "The causal link may be established by an inference derived from

circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.'" [Citation.]" (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 69, hereafter "*Morgan.*")

As we discussed above, however, AQMD presented substantial evidence to show that despite the timing of the transfer, the transfer was *not* an adverse employment decision. It was undisputed that plaintiff retained the same compensation, benefits and seniority after his involuntary transfer. Although his commute was lengthened, an increase in commute time from 5-7 minutes to 2 hours daily is not significant enough, as a matter of law, to constitute an adverse employment action. (See *Sanchez v. Denver Public Schools* (10th Cir. 1998) 164 F.3d 527, 532; *Grande v. State Farm Mut. Auto. Ins. Co.* (E.D. Pa. 2000) 83 F.Supp.2d 559, 563.) No reasonable factfinder could rationally find a two-hour daily commute into Los Angeles County to be unusual. While plaintiff was fortunate to have had a 5-7 minute commute to Riverside, he had no protected or permanent right to retain such a short commute. Given the lack of evidence to show the transfer was an adverse employment action, the timing of the transfer is insufficient to warrant a reversal of the summary judgment.

Plaintiff contends nothing in the MOU specifically authorized AQMD to impose an involuntary transfer to improve morale. We respond that nothing in the MOU prohibited AQMD from doing so. Moreover, no reasonable factfinder could reject morale as a legitimate factor in making such employment decisions.

Plaintiff does not dispute that after the transfer, the discrepancy between his job classification and pay scale was eliminated. He argues, however, that the discrepancy that existed at Riverside was only on paper because he was actually "performing the duties of a Tech II and performing more difficult than what was assigned to the Tech I[']s." But plaintiff provides no evidence to support his own view of his job performance and duties at Riverside. "The process by which individuals' qualifications and work performance are measured against job requirements is often at least partially a

subjective one on the part of the evaluator. [Citations.] 'The decisionmaker's motive and state of mind will almost always be in dispute in such cases,' but 'the plaintiff "'must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses.'" [Citations.]' [Citation.]" (*Morgan, supra,* 88 Cal.App.4th at pp. 75-76.) "'[A]n employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact.' [Citation.]" (*Id.* at p. 76.) Plaintiff's self-assessment of the nature of his duties and the quality of his performance is insufficient to create a conflict in the evidence regarding the stated reasons for his transfer.

Finally, even if the transfer constituted an adverse employment action (which it did not), plaintiff presented no evidence to demonstrate any weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in AQMD's stated reasons for the transfer such that a reasonable factfinder could rationally reject them and infer that the stated reasons were pretextual. As we discuss below, the evidence of intentional discrimination was so weak that it failed, as a matter of law, to create a triable issue of material fact.

III

Plaintiff contends that because the trial court found "ample circumstantial evidence from which a jury could infer that the underlying motive of the harassing conduct is ethnic or other prohibited category related[,]" the court erred in concluding, as a matter of law, that plaintiff did not suffer a retaliatory transfer or illegal discrimination.

What plaintiff fails to explain in his opening brief, however, is that the trial court made the above statement at a *demurrer* hearing on February 14, 2002, and *not* at the summary judgment hearing on September 5, 2002. Plaintiff merely alludes to this fact in his opening brief by stating that "since Judge Aragon previously found ample circumstantial evidence of ethnic or other prohibited category bias, this satisfied the prima facie case showing of discrimination. The ultimate factual finding of

discrimination was a job for the jury. A job which Judge Aragon erroneously usurped by his mistaken ruling on summary judgment."

It is plaintiff, however, who has erred by relying on a judicial comment made at a demurrer hearing instead of evidence which shows that the underlying motive of the transfer or harassment was discrimination. We refuse to infer from the trial court's comment, which plaintiff has taken out of context, that a triable issue of material fact exists as to whether plaintiff was subjected to harassment or discrimination. "At this point, to avoid summary judgment, appellant had to '"offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination."' [Citation.] An employee in this situation can not 'simply show the employer's decision was wrong, mistaken, or unwise. Rather the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citation.]" [Citation.]' [Citation.]"[5] (*Morgan, supra,* 88 Cal.App.4th at p. 75.)

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5 Plaintiff accuses the trial court of committing reversible error by applying the wrong standard of review and erroneously concluding that his evidence was not substantial enough to defeat summary judgment. The trial court, however, committed no such error. As stated in *Morgan,* which was also a summary judgment case, appellant had to '"offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination."' (*Morgan, supra,* 88 Cal.App.4th at p. 75.)

Plaintiff makes several other allegations of trial court error, such as the allegation that the court (in plaintiff's view) expressed doubts about its ruling and violated public policy by depriving him of a trial. Having examined the record, we conclude the allegations are meritless and require no further discussion.

Given plaintiff's concession that "Defendants in this case made no overt racial or ethnic slurs regarding [plaintiff's] race or national origin," the only remaining evidence to support his theory of discrimination consists of a few stray remarks such as: "'If these people are going to be here, they should learn English'"; and "'You are being silly Refaat as you become old.'" These remarks, as defendants point out, were isolated, trivial, and did not alter the conditions of his employment.

To show a hostile work environment, "'The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he] was actually offended.' [Citation.] '[H]arassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]' [Citation.]" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130-131.) We conclude the evidence in this case does not, as a matter of law, constitute evidence of harassment or discrimination.

DISPOSITION

We affirm the summary judgment for defendants. The parties are to bear their own costs.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

MALLANO, J.